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SUPREME COURT, U. S.

No. 75-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MONSANTO COMPANY,
Petitioner,

v.

REED BROTHERS, INC.,
Respondent.

REPLY BRIEF OF PETITIONER MONSANTO COMPANY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRED H. BARTLIT, JR.
MICHAEL T. HANNAFAN
Attorneys for Petitioner,
MONSANTO COMPANY

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

DATED: January 7, 1976

CHAS. P. YOUNG-CHICAGO

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1. The Questions Presented for Review Are Solely Questions of Law.

Respondent's opposition to Monsanto's petition for a writ of certiorari is bottomed on the erroneous contention that the petition seeks review of a jury's factual determination. This position misapprehends the questions presented.

The precise issue raised by Monsanto is succinctly set forth in the opinion below:

> "From our examination of the record, we think that the jury could well have concluded that Monsanto's 1969 and 1972 policies *directly effected* [sic] where its distributors could sell and to whom they could sell, *which is precisely the sort of restraint forbidden in Schwinn.*" (Cert. Pet., App. A, p. 14; emphasis added.)

Monsanto's petition questions only the Eighth Circuit's above-stated conclusion of law that the 1969 warehouse loading policy and 1972 distributor compensation program are "the sort of restraints forbidden in *Schwinn*" if they had an "effect" on distributors' resale decisions. Contrary to respondent's contention, Monsanto does not challenge the jury's factual determination that the two policies had an economic effect on where and to whom distributors sold.

The Court of Appeals based its conclusion that Monsanto's policies "directly affected" distributors' resale decisions on the fact that these policies made sales outside primary areas or to non-retail customers "economically unattractive" as a result of added freight charges or lack of compensation. (Cert. Pet., App. A., pp. 4-6, 14, 22.) The petition seeks review only of the clear-cut holding that these policies violate the *Schwinn per se* rule simply because their impact on the profitability of certain sales affects a distributor's choice about where and to whom to sell. This holding requires review because it is unprecedented, is not required by *Schwinn*, is contrary to numerous decisions of other circuits and has a dangerously broad commercial impact.

Respondent attempts to blur this sharply defined legal issue by arguing that there was evidence of "predatory acts" and "coercion." (Resp. Br., pp. 3, 11.) However, the separate *per se* jury instructions challenged in the petition were addressed to the warehouse loading and compensation policies standing alone and did not refer to coercive conduct:

> "(2) If you find that the compensation aspects of the Monsanto distributor marketing program are carried on by means of contracts, combinations or agreements between defendant and any of its contract distributors, and if you find that the compensation aspects of the Monsanto distributor marketing program have the *effect of limiting* the right of any of defendant's distributors to freely choose the parties to whom or

the conditions upon which the distributors will resell Monsanto products, *the defendant has committed a per se violation of the Sherman Act.*

"(3) If you find that the shipping restrictions implemented by defendant are carried on by means of contracts, combinations or agreements between defendant and any of its contract distributors, and if you find that defendant's shipping restrictions have the *effect of limiting* the right of any of defendant's distributors to freely choose where, or to whom, or the conditions upon which the distributors will resell Monsanto products, *the defendant has committed a per se violation of the Sherman Act.*" (Jury Instr. No. 10(2), (3); emphasis added.)

Equally significant is the fact that the exhibit offered by respondent to support post-1968 damages was also based on the warehouse loading and compensation policies standing alone without reference to coercion (RX-97):

"Damages Due To Distributor Marketing Program and Shipping Policies Based On Level Sales

	Net Profit	Lost Sales	Damages
1972	4.3%	$705,115.25	$30,319.96
1973	3.75% (Average of Previous 4 Years)	$777,078.31	$29,140.44
			$59,460.40"

Because the challenged jury instructions and damage award were carefully, intentionally and narrowly limited to the 1969 and 1972 Monsanto policies, the issue of law raised by this petition is also limited to these policies. The only remaining question, therefore, is whether review of this issue of law is required.

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2. The Decision Below Conflicts With Decisions of Other Circuits Regarding Location Clauses and Pass-Over Payments.

Monsanto's petition describes how lawful retailer location clause agreements and Monsanto's warehouse loading policy are the same in both operation and economic effect. (Cert. Pet., pp. 10-14.) Like retailers who are supplied only at a specified store location, Monsanto distributors are supplied only at a specified warehouse location. In both instances, the reseller's point of supply is anchored to a designated location. Both practices have the same economic effect on resale decisions: the further the potential customer is located from the retail store or loading warehouse, the higher transportation and sales costs become, thereby making distant sales economically less attractive.

Monsanto's petition also describes many appellate decisions validating pass-over payments and other practices which, like Monsanto's distributor compensation programs and warehouse loading policy, have an economic effect on resale decisions. (Cert. Pet., pp. 14-18.) Under lawful pass-over agreements, a distributor selling in a competing distributor's territory must pay that local distributor for the privilege of making such sales. Like pass-over payments, Monsanto's compensation and warehouse loading policies make certain sales more costly to the distributor than other sales. Since these practices have been treated differently by the courts despite their similar discouraging effect on a distributor's choice about where and to whom to sell, the conflict among the circuits is apparent.[1]

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[1] Respondent does not dispute that the effect of Monsanto's policies is the same as the effect of agreements held lawful by other circuits, but begs the question by arguing that the issue of effect was for the jury. As noted earlier, the issue presented is not whether an *effect* exists but whether the mere existence of such an effect is *per se* unlawful.

3. The Bizarre Commercial Impact of The Opinion Below Is Not Required by Any Decision of This Court.

The petition points out that the decision below requires a manufacturer to supply a customer at any location the customer desires regardless of logistic or administrative problems. The Eighth Circuit's opinion also prevents a manufacturer from paying a distributor for providing services such as shelving products early in the year to increase sales. These irrational commercial results are not disputed by respondent and, standing alone, constitute a compelling reason for review.

Precluding a manufacturer from selecting a customer's loading point is not required by, and in fact conflicts with, the decisions of this Court which uniformly emphasize the right of a manufacturer to choose its own customers:

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

A fortiori, if a manufacturer can select its own customers, it must also have the lesser included right to select the locations at which it will sell to those customers. See *World of Sleep, Inc.* v. *Stearns & Foster Co.*, 1975-2 CCH Trade Cas. ¶ 60,564, at p. 67,472-473 (10th Cir. 1975) (supplier's refusal to ship beds to customer's second store not challenged).

Despite this aspect of *Schwinn,* both the Eighth Circuit and respondent take the position that *any* agreement which has any limiting effect whatsoever on distributors' resale decisions is *per se* unlawful. (Cert. Pet., App. A, pp. 14, 22; Resp. Br., p. 13.) First, this position is squarely contrary

to the fundamental statement of the rule of reason which acknowledges that all agreements by their very nature have a restraining effect but are not all, for that reason alone, necessarily *per se* unlawful:

> *"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.* The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231, 238 (1918) (emphasis added).

Second, *Schwinn* did not hold that every vertical agreement is *per se* illegal merely because it has an effect on resale decisions. Unlike Monsanto's warehouse loading and compensation policies, the agreements condemned as *per se* unlawful in *Schwinn* by their express terms restricted territories and customers. Moreover, *Schwinn* specifically recognized that not all arrangements that have a restraining effect on territories and customers are thereby *per se* illegal. (388 U.S. at 378-380.) Accordingly, this Court rejected application of a *per se* rule to the agency, consignment and Schwinn-Plan transactions even though they had the same restricting effects as the agreements held unlawful. (388 U.S. at 379-380.)

Conclusion

The decision below creates straightforward conflicts among the courts of appeals. For this reason and in view of the Ninth Circuit's doubt concerning the application of *Schwinn's per se* rule to retailer location clause agreements, *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 1974-1 CCH Trade Cas. ¶ 75,072, *withdrawn for rehearing en banc,* 1974-2 CCH Trade Cas. ¶ 75,435 (9th Cir. 1974), it is necessary to the consistent and predictable enforcement of the

antitrust laws that this Court now resolve the conflict among the circuits.[2] This case presents an appropriate opportunity to consider whether the *Schwinn per se* rule reaches agreements merely because they make certain sales economically less attractive than others. Accordingly, Monsanto's petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED H. BARTLIT, JR.
MICHAEL T. HANNAFAN
Attorneys for Petitioner,
MONSANTO COMPANY

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

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[2] Justice Clark, who wrote the opinion below, also was the trial judge in *GTE Sylvania* where he instructed the jury, contrary to the authorities, that any effort to restrict locations from which products can be resold is *per se* unlawful regardless of reasonableness. *GTE Sylvania, supra,* 1974-1 CCH Trade Cas. ¶ 75,072, at p. 96,793. Justice Clark did not sit in *Schwinn,* but dissented in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963).